IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD FLECK and DIANE FLECK, *Plaintiffs,*	:	
v.	:	
HOFFINGER INDUSTRIES, INC. and DOUGHBOY RECREATIONAL, INC., *Defendants,*	:	CIVIL ACTION NO. 91-5089
and	:	
JAMES HUBERT, *Third Party Defendant.*	:	

MEMORANDUM

BUCKWALTER, J. August 23, 1993

I. BACKGROUND

Plaintiffs filed a personal injury action against the defendants in the Court of Common Pleas of Philadelphia County (August Term, 1989 – No. 568) by a filing of a Writ of Summons on August 8, 1989. Subsequently, plaintiffs filed a complaint against defendants on July 12, 1991, which was removed to this court on August 8, 1991. In that complaint, plaintiffs allege that Richard Fleck was injured on or about August 8, 1987 when he dove from a wooden deck into an above ground swimming pool located at the home of James Hubert, and which above ground swimming pool contained a vinyl liner manufactured by Hoffinger and Doughboy which was defective because it did not contain adequate depth markers, warnings and/or instructions. In a prior civil action in this court (No. 89-1348), the plaintiffs had

ENTERED: 8/25/93

CLERK OF COURT

instituted a products liability action against KDI Sylvan Pools, Inc. a/k/a Sylvan Pools, Muskin, Inc., Nichols Swim Pools, Inc. and James Hubert based on a strict liability failure to warn theory arising out of the injuries sustained by Richard Fleck on August 8, 1987. In the 89-1348 action, the defendant Nichols Swim Pools, Inc. (hereafter Nichols), the seller of the replacement swimming pool liner that was in the pool at the time of Richard Fleck's accident, filed a third-party complaint against Doughboy Recreational, Inc., a division of Hoffinger Industries, Inc., the manufacturer of the replacement swimming pool liner, seeking indemnification for all damages which might be awarded in favor of the Flecks against Nichols.

Prior to trial in 89-1348, Nichols filed a petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code. Thus, in order to proceed in 89-1348, the Flecks filed a petition to the Bankruptcy Court requesting relief from the automatic stay. Judge Twardowski granted the stay but provided that any verdict or judgment entered in favor of the Flecks against Nichols would be limited to the proceeds of applicable insurance available to Nichols. At the trial of 89-1348, the Flecks sole theory against Nichols was that the replacement pool liner sold by Nichols was a defective product because it did not contain any warning signs or depth markers. At that trial, counsel for the Flecks made a motion for leave to amend plaintiffs' complaint to allege negligence against Nichols as well as strict liability on the ground that Nichols was negligent in stopping its prior practice of handing out warnings when it sold products and failing to see that the original pool liner, which was replaced, did not have warnings on it, and in continuing not to put warnings on the swimming pools that it displayed. This motion was denied. Also during the trial of 89-1348, Nichols made a motion for a directed verdict with respect to its third party claim for indemnification against Hoffinger, which motion was granted.

At the conclusion of the trial in 89-1348, the jury found that the replacement swimming pool liner was defective and that the defect was a substantial factor in bringing about plaintiff's harm, and returned a verdict in favor of Richard Fleck in the amount of $10,000,000.00 and in favor of Diane Fleck in the amount of $250,000. On November 21, 1990, judgment was entered against Nichols and in favor of Richard Fleck in the amount of $11,750,000.00, and in favor Diane Fleck in the amount of $293,750.00, representing the verdict plus delay damages. Thereafter, on or about December 1991, the insurance carrier for Nichols tendered the amount of $2,092,513.00 representing the available proceeds of Nichols' insurance policies plus post-judgment interest to the date of settlement, and the Flecks accepted the tender and entered a partial satisfaction of judgment in favor of Richard Fleck to the extent of $2,040,200.20, and a partial satisfaction of the judgment in favor of Diane Fleck in the amount of $52,312.80.

Post-trial motions were filed by Hoffinger but denied by this court which resulted in Hoffinger's appeal to the Third circuit.

The Third Circuit affirmed this court's order except for the following errors:

> (1) The district court erred when it refused to award Nichols attorneys' fees and costs incurred in the underlying defense litigation and Nichols' indemnification action; and
>
> (2) The district court erred when it refused to reduce the jury verdict to an amount equal to the insurance proceeds available to Nichols.

With regard to those two matters, the case was remanded to this court for further proceedings as to the attorneys' fees and costs, and with instructions to mold the jury verdict to an amount equal to the insurance proceeds available.

On February 4, 1993, Hoffinger filed a petition for Writ of Certiorari to the United States Supreme Court which was denied.

As previously indicated in 89-1348, plaintiffs had a direct cause of action against Nichols, but had not filed a direct cause of action against Hoffinger. Nichols had the claim over against Hoffinger for indemnification. At the trial in 89-1348, Hoffinger and Nichols had identical interests in defending against plaintiffs' strict liability claim and plaintiffs' claim for damages. In fact, Hoffinger's attorney, Robert Korn, Esquire, in the words taken from plaintiffs' motion for summary judgment in this case, "took the laboring oar of the defense".

In this present action removed from state court, the Flecks' allegations against Hoffinger are the same allegations that they made against Nichols in the 89-1348 action; namely, that liner was defective, that the defect was a substantial factor causing the accident, and that as a result thereof, plaintiffs suffered damages. In the 89-1348 action, Hoffinger was both an active party defending against plaintiffs' claims and in privity with defendant Nichols. Hoffinger had a full and fair opportunity to litigate all the issues in question and availed itself of that opportunity. There is no genuine issue as to any material fact in the action now before the court that has not already been litigated by the present parties and decided in the prior action.

Based upon the foregoing, not surprisingly, both parties have filed motions for summary judgment. The plaintiffs argue that principles of collateral estoppel require the grant of their motion, while the defendants argue that by virtue of the doctrine of res judicata, the plaintiffs are barred from relitigating against Hoffinger and Doughboy in this case the same cause of action and/or same claims for damages asserted by them in 89-1348.

II. DISCUSSION

Although the parties to this summary judgment motion have frequently referred to the terms of res judicata and collateral estoppel, the preferred terms in recent years have been claim preclusion instead of res judicata, and issue preclusion instead of collateral estoppel. See *Wade v. City of Pittsburgh,* 765 F.2d 405 (1985), at p. 408.

Federal law of claim preclusion requires a defendant to demonstrate that there has been:

> (a) A final judgment on the merits in a prior suit;
>
> (b) That the prior suit involved the same parties or their privies; and
>
> (c) A subsequent suit between the same parties or their privies based on the same cause of action.

Lubrizol Corp. v. Exxon Corp., 929 F.2d 960 (3d Cir. 1991), citing *United States v. Athlone Indus., Inc.,* 746 F.2d 977, 983 (3d Cir. 1984). Applying that standard, it seems clear to me that there was a final judgment on the merits in the prior suit, 89-1348; that the prior suit involved the same parties or their privies, a finding agreed upon by the parties to this suit; and the subsequent suit, the one now before me, is based on the same cause of action as 89-1348.

While plaintiffs are in agreement with the general principal of law applicable to this case, in their brief filed in opposition to defendant's motion for summary judgment they contend that a second lawsuit even against the same defendant based on the same set of facts is not barred by res judicata when the monetary damages sought in the second lawsuit could not have been awarded to the plaintiffs in the first lawsuit. In support of this proposition, they cite the case of *Davidson v. Capuano,* (2d Cir. 1986) 792 F.2d 275. That case involved one in which the plaintiff had prevailed in a

state court proceeding brought under Article 78 of the New York Civil Practice Law and Rules in which he sought, in addition to having his prison records expunged of all reference to an earlier disciplinary proceeding, a reinstatement of his prisoner benefits and the return of property taken from his prison cell. He also sought in a proceeding under 42 U.S.C. 1983 to assert a similar claim but to seek only damages. In that case, the Second Circuit ruled that the bar against later claims based upon the same cause of action is subject to certain limitations, one of which is that it will not be applied if the initial forum did not have the power to award the full measure of relief sought in the later litigation. The court then concluded that under the state proceeding which the plaintiff had brought, he could not have received damages for civil rights violations.

The *Davidson* case differs from the one presently before the court in that this court always had the power to award the damages which plaintiff was seeking. The cap on those damages came as a result of plaintiff's unilateral action in seeking a stay of the bankruptcy proceedings so that it could proceed against Nichols.

Should plaintiffs be penalized for not proceeding directly against Hoffinger in 89-1348? I think the answer is Yes. As stated in *Wright, Miller & Cooper Federal Practice and Procedure: Jurisdiction Section 4412,* "It is clear enough that a litigant should not be penalized for failing to seek unified disposition of matters that could not have been combined in a single proceeding, and even clearer that no penalty should be inflicted if a deliberate effort to combine such matters has been expressly rejected" By contrast, however, there was nothing to prevent plaintiffs from combining the present action against Hoffinger with that brought against Nichols in 89-1348. Moreover, there was never any effort to reject the combining of this case with 89-1348.

The cause of action in this present case could have been directly raised and resolved against defendant in the prior proceeding. The doctrine of claim preclusion

precludes the relitigation of matters based on the same cause of action that were or could have been raised and resolved in a prior proceeding. See *Napier v. Thirty or More Unidentified Fed. Agents,* 855 F.2d 108 (3d Cir. 1988).

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD FLECK and DIANE FLECK, *Plaintiffs,*	:	
v.	:	
HOFFINGER INDUSTRIES, INC. and DOUGHBOY RECREATIONAL, INC., *Defendants,*	:	CIVIL ACTION
	:	NO. 91-5089
and	:	
JAMES HUBERT, *Third Party Defendant.*	:	

ORDER

AND NOW, this 23rd day of August, 1993, the order of this court dated June 14, 1993 denying defendants' motion for summary judgment is VACATED. Judgment is entered in favor of defendant Hoffinger Industries, Inc. and Doughboy Recreational, Inc., and against plaintiffs, Richard Fleck and Diane Fleck. On plaintiffs' motion for summary judgment (Document No. 38), said motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:

RONALD L. BUCKWALTER, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1902

RICHARD FLECK; DIANE FLECK,
Appellants

v.

HOFFINGER INDUSTRIES, INC.;
DOUGHBOY RECREATIONAL, INC.,
Third-Party Plaintiffs

v.

KDI SYLVAN POOLS, INC., a/k/a SYLVAN POOLS;
JAMES HUBERT; POSEIDON POOLS OF AMERICA, INC.;
GIBRALTAR CORP. OF AMERICA, formerly
GIBRALTAR FACTORS CORP.; S & V POOLS, INC.,
Third-Party Defendants

Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 91-cv-05089
(Honorable Ronald L. Buckwalter)

Argued May 31, 1994

Before: SCIRICA, NYGAARD and ALDISERT,
Circuit Judges

AMENDED JUDGMENT ORDER*

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*The Judgment Order entered June 13, 1994, is hereby vacated.

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court entered August 25, 1993, be and is hereby AFFIRMED.

Costs taxed against appellants.

BY THE COURT,

Circuit Judge

Attest:

P. Douglas Sisk, Clerk

Costs taxed in favor of Hoffinger Industries & Doughboy Recreational:

Brief $140.52

Certified as a true copy and issued in lieu of a formal mandate on July 14, 1994

Teste:

Clerk, United States Court of Appeals for the Third Circuit